IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 8, 2003 Session

B. F. NASHVILLE, INC. v. CITY OF FRANKLIN, TENNESSEE

Appeal from the Chancery Court for Williamson County
No. 28940 Russ Heldman, Judge

No. M2003-00180-COA-R3-CV - Filed January 21, 2005

Three years after its free-standing advertising sign was damaged in a thunderstorm and removed, the owner of a restaurant in Franklin decided to erect a replacement sign. Although the restaurant had not proceeded with its plans to the point of applying for a permit, it was notified by the city that it must remove the support posts remaining from the original sign. That notice also stated that the old sign could not be reconstructed since it did not conform to a new sign ordinance. The restaurant owner filed a complaint for declaratory judgment, seeking a declaration that it had a vested right under Tenn. Code Ann. § 13-7-208 to erect a non-conforming replacement sign. The trial court dismissed the complaint. We hold that although the protections of Tenn. Code Ann. § 13-7-208 apply generally to on-site advertising signs, the restaurant was not entitled to a declaratory judgment that its sign could be reconstructed without regard to the city's sign ordinance. We affirm the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

George H. Nolan; Jonathan D. Rose, Nashville, Tennessee, for the appellant, B. F. Nashville, Inc.

Douglas Berry, Nashville, Tennessee, for the appellee, City of Franklin, Tennessee.

OPINION

B.F. Nashville, Inc. ("B.F."), the plaintiff in this case, is the owner/operator of a Wendy's restaurant adjacent to I-65 in Franklin, Tennessee ("City"). At the time of the restaurant's construction in 1983, a large free-standing sign was erected to advertise its location. The pylon supporting the sign was 116 feet tall, and the face of the sign measured about 20 feet by 20 feet. At the time it was erected, the sign complied with all applicable ordinances. In 1995, Franklin enacted a sign ordinance that would have prohibited the existing sign.

On March 3, 1999, a fierce thunderstorm with heavy winds caused the partial collapse of the sign. The City's Director of Codes Administration promptly ordered that the damaged sign be removed because it was unsafe.[1] He also required that any replacement sign be designed to withstand winds of up to seventy miles per hour. The restaurant owner then removed the sign and portions of its telescopic support pole.

Several years later, B.F. ultimately decided to construct a replacement sign that would be in compliance with the wind resistance requirement. The plan called for the new sign to rise 85 feet, instead of the original's 116 feet. However, on March 22, 2002, the City's Sign Codes Administrator sent a letter to B.F. stating that since the collapsed sign "was a legally non-conforming sign" (*i.e.*, it did not comply with Franklin's existing sign ordinance), "it was not allowed to be reconstructed." Neither party alleges B.F. had discussed with City officials its plan to construct a sign, and it is not clear from the record what prompted the letter.[2] The administrator also ordered that the remainder of the support posts be removed within ninety days of the receipt of the letter.

I. TRIAL PROCEEDINGS

On July 16, 2002, B.F. filed a complaint for declaratory judgment in the Chancery Court of Williamson County. The complaint alleged that the City, through its sign administrator, had asserted the zoning ordinance prohibited reconstruction of the sign unless it conformed to the existing sign ordinance. B.F. alleged it had a statutory right to reconstruct the subject sign. The specific relief

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[1]The letter from the Director of Codes Administration, dated March 3, 1999, stated this was the second time storms had damaged the sign and, as grounds for the order to remove the sign, cited a section of the Franklin Zoning Ordinance and two sections of the Standard Building Code. The letter continued:

> This structure should be designed to sufficiently support the loads and forces encountered upon the sign. Wind loads of 70-miles per hour and above should be taken into consideration.
>
> This sign is posing a severe traffic hazard in the area and also could eliminate a major power source to our city. A major power line runs adjacent to this sign. We realize you are taking immediate action to correct the problem and please get with us at your earliest convenience on the next sign that may come in its place.

[2]The final sentence of the letter provides, "More than three years has passed and it is now time to remove the pylon sign post within (90) ninety days from date of this letter." The City later explained that the letter was sent pursuant to another provision of the Franklin sign ordinance regarding nonconforming signs that states:

> 8.7.5(5) Notice to Remove Abandoned Signs: If the codes director finds that an abandoned sign has not been removed within ninety (90) days from the cessation of a particular use, then he shall give written notice to the owner, agent, or person having the beneficial interest in the building or the premises on which the sign is located. Removal of the sign shall be effected within thirty (30) days after receipt of the notice from the codes director. If the sign is not removed after thirty (30) days, then the codes director is hereby authorized to cause the sign to be removed immediately at the expense of the owner, agent, or person have the beneficial interest in the building or premises on which the sign is located.

requested was a declaration that, pursuant to T.C.A. § 13-7-208, "[B.F.] has a statutory right to reconstruct the subject sign regardless of the provisions of the Franklin Zoning Ordinance."

The City responded with a Tenn. R. Civ. P. 12.02(6) motion to dismiss, contending only that because B.F. had not availed itself of its right to appeal to the Board of Zoning Appeals, it had not exhausted its administrative remedies and, therefore, was not entitled to a declaratory judgment.

At the initial hearing on the motion to dismiss, the trial court asked the parties to brief the question of whether Tenn. Code Ann. § 13-7-208 was applicable to the present case, particularly in light of this court's recent holding in *National/Auto Truck Stops, Inc. v. Williamson County,* No. M2000-02456-COA-R3-CV, 2001 WL 434860 (Tenn. Ct. App. April 30, 2001) (perm. app. denied September 24, 2001). By agreed order, the City was allowed to amend its motion to dismiss to add the ground that the non-conforming use statute, Tenn. Code Ann. § 13-7-208, did not apply to the sign at issue.

After the amended motion to dismiss was heard, the trial court ruled in favor of the City, and in a three-sentence order, granted the motion. The court's order does not set forth its reasoning or state upon what grounds it relied. This appeal followed.

II. STANDARD OF REVIEW

A Tenn. R. Civ. P. 12.02(6) motion admits the truth of all the relevant and material factual allegations in the complaint but asserts that no cause of action arises from these facts. *Davis v. The Tennessean*, 83 S.W.3d 125, 127 (Tenn. Ct. App. 2001). In reviewing the trial court's grant of the motion to dismiss, we must presume that the factual allegations in the complaint are true, and review *de novo* the trial court's legal conclusion that Plaintiff failed to state a claim for relief. *Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 986 S.W.2d 550, 554 (Tenn. 1999); *Stein v. Davidson Hotel* Co., 945 S.W.2d 714, 716 (Tenn. 1997). Additionally, our review of a trial court's determinations on issues of law is *de novo*, with no presumption of correctness. *Frye v. Blue Ridge Neuroscience Center, P.C.*, 70 S.W.3d 710, 713 (Tenn. 2002); *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn.2000); *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

The issues raised in this appeal involve the interpretation of state statutes and local ordinances. The primary rule of statutory construction is "to ascertain and give effect to the intention and purpose of the legislature." *LensCrafters, Inc. v. Sundquist*, 33 S.W.3d 772, 777 (Tenn. 2000); *Carson Creek Vacation Resorts, Inc. v. Department of Revenue*, 865 S.W.2d 1, 2 (Tenn. 1993); *McGee v. Best*, 106 S.W.3d 48, 64 (Tenn. Ct. App. 2002). To determine legislative intent, one must look to the natural and ordinary meaning of the language used in the statute itself. We must examine any provision within the context of the entire statute and in light of its over-arching purpose and the goals it serves. *State v. Flemming*, 19 S.W.3d 195, 197 (Tenn.2000); *Cohen v. Cohen*, 937 S.W.2d 823, 828 (Tenn. 1996); *T.R. Mills Contractors, Inc. v. WRH Enterprises*, LLC, 93 S.W.3d 861, 867 (Tenn. Ct. App. 2002). The statute should be read "without any forced or subtle construction which would extend or limit its meaning." *National Gas Distributors, Inc. v. State*, 804 S.W.2d 66, 67

(Tenn.1991). As our Supreme Court has said, "[w]e must seek a reasonable construction in light of the purposes, objectives, and spirit of the statute based on good sound reasoning." *Scott v. Ashland Healthcare Center, Inc.*, 49 S.W.3d 281, 286 (Tenn. 2001), citing *State v. Turner*, 913 S.W.2d 158, 160 (Tenn. 1995).

Courts are also instructed to "give effect to every word, phrase, clause and sentence of the act in order to carry out the legislative intent." *Tidwell v. Collins*, 522 S.W.2d 674, 676-77 (Tenn.1975). *In re Estate of Dobbins*, 987 S.W.2d 30, 34 (Tenn. Ct. App. 1998). Courts must presume that the General Assembly selected these words deliberately, *Tenn. Manufactured Housing Ass'n. v. Metropolitan Gov't.*, 798 S.W.2d 254, 257 (Tenn. App.1990), and that the use of these words conveys some intent and carries meaning and purpose. *Tennessee Growers, Inc. v. King*, 682 S.W.2d 203, 205 (Tenn.1984). *Clark v. Crow*, 37 S.W.3d 919, 922 (Tenn. Ct. App. 2000). The same rules and principles are applied when construing zoning ordinances. *Lions Head Homeowners' Ass'n v. Metropolitan Bd. of Zoning Appeals*, 968 S.W.2d 296, 301 (Tenn. Ct. App. 1997).

III. THE SIGN ORDINANCE AND THE STATUTE

The portion of the Franklin Zoning Ordinance that deals with signs includes a section, numbered 8.7.5, on Nonconforming Signs. That section begins with a preamble stating the goals:

> This section recognizes the eventual removal, as expeditiously and as fairly as possible, of nonconforming signs and (sic) is as much a subject of health, safety, and welfare as is the prohibition of new signs that would violate the provisions of this ordinance. It is also the intent of this section that the removal of nonconforming signs shall be effected so as to avoid the unreasonable invasion of established property rights.

In determining that the reconstruction of B.F.'s sign as proposed by B.F. was prohibited, the City relied upon the following provision of the sign ordinance:

> 8.7.5(2) Removal, Replacement, Reconstruction, or Relocation. No nonconforming sign shall be removed, replaced, reconstructed, or relocated in whole or in part to any other location on the same or any other lot unless the replaced, reconstructed, or relocated sign conforms to the provisions of this ordinance.

The sign proposed by B.F. would not conform to two provisions of the sign ordinance: specifically, the provisions that limit signs that are located within 1,500 feet of the interstate to a height of 20 feet and that allow only one freestanding sign per lot.[3] In addition, the letter of March 22, 2002, was based on another section of the zoning ordinance applicable to Nonconforming Signs which addresses abandonment:

[3]The record indicates that another freestanding sign remains in place on the restaurant property.

8.7.5(4) *Abandonment*: Abandoning a sign shall terminate the right to maintain the sign, and the sign owner shall be required to remove the sign. A nonconforming sign shall be considered to be abandoned in the following situations, regardless of reservation of an intent not to abandon, or of an intent to reserve the right to use the sign:

a. a sign displaying no advertising message for a period of ninety (90) days. Copy on the sign indicating the sign is for lease or sale shall not be construed as the display of an advertising message; and

b. signs which advertise a terminated activity, business product, or service which has not been produced, conducted, sold, or performed for a period of ninety (90) days on the premises where the sign is located.

B.F. argues that it has a vested right to rebuild the sign by virtue of the provisions of Tenn. Code Ann. § 13-7-208. That statute was designed to protect the right of a business owner to continue to operate a lawful enterprise on its own property where a subsequent zoning change prohibits that particular use of the property, *i.e.*, to continue a non-conforming use. *See* 101A C.J.S. *Zoning & Land Planning* § 154 (1979). Because of the arguments and issues raised herein, it is necessary to quote the relevant sections of Tenn. Code Ann. § 13-7-208 as they existed at the relevant times:

(b) (1) In the event that a zoning change occurs in any land area where such land area was not previously covered by any zoning restrictions of any governmental agency of this state or its political subdivisions, or where such land area is covered by zoning restrictions of a governmental agency of this state or its political subdivisions, and such zoning restrictions differ from zoning restrictions imposed after the zoning change, then any industrial, commercial or business establishment in operation, permitted to operate under zoning regulations or exceptions thereto prior to the zoning change shall be allowed to continue in operation and be permitted; provided, that no change in the use of the land is undertaken by such industry or business.

* * *

(c) Industrial, commercial or other business establishments in operation and permitted to operate under zoning regulations or exceptions thereto in effect immediately preceding a change in zoning shall be allowed to expand operations and construct additional facilities which involve an actual continuance and expansion of the activities of the industry or business which were permitted and being conducted prior to the change in zoning; provided, that there is a reasonable amount of space for such expansion on the property owned by such industry or business situated within the area which is affected by the change in zoning, so as to avoid nuisances to

adjoining landowners. No building permit or like permission for construction or landscaping shall be denied to an industry or business seeking to expand and continue activities conducted by that industry or business which were permitted prior to the change in zoning; provided, that there is a reasonable amount of space for such expansion on the property owned by such industry or business situated within the area which is affected by the change in zoning, so as to avoid nuisances to adjoining landowners.

(d) Industrial, commercial, or other business establishments in operation and permitted to operate under zoning regulations or exceptions thereto immediately preceding a change in zoning shall be allowed to destroy present facilities and reconstruct new facilities necessary to the conduct of such industry or business subsequent to the zoning change; provided, that no destruction and rebuilding shall occur which shall act to change the use classification of the land as classified under any zoning regulation or exceptions thereto in effect immediately prior to or subsequent to a change in the zoning of the land area on which such industry or business is located. No building permit or like permission for demolition, construction, or landscaping shall be denied to an industry or business seeking to destroy and reconstruct facilities necessary to the continued conduct of the activities of that industry or business, where such conduct was permitted prior to a change in zoning; provided, that there is a reasonable amount of space for such expansion on the property owned by such industry or business situated within the area which is affected by the change in zoning, so as to avoid nuisances to adjoining landowners.

IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES

After B.F. received the letter of March 22, 2003, from the City's Sign Codes Administrator, it did not apply for a permit to reconstruct[4] its sign or appeal the administrator's interpretation or determination to the Franklin Board of Zoning Appeals. The City argues that B.F. was not entitled to a declaratory judgment until it exhausted its administrative remedies. B.F. contends that because it has a vested right to reconstruct the sign, it is not required to seek a permit or appeal to the board. It also contends that it should be allowed to avail itself of the exception to the general rule for those situations where "resort to the administrative route is futile or the remedy inadequate." B.F. argues that while the Board of Zoning Appeals is authorized to grant conditional use permits and variances, it does not possess the authority to construe the non-conforming use statute, and thus resort to the Board would be futile.

In applying the doctrine of exhaustion of administrative remedies, courts must determine whether a statute provides an administrative remedy. If a statute explicitly provides an administrative remedy, a party must exhaust this remedy prior to seeking relief from the courts. *Thomas v. State Bd. of Equalization*, 940 S.W.2d 563, 566 (Tenn. 1997); *Bracey v. Woods*, 571

[4]The Franklin sign ordinance requires a permit for reconstruction of a nonconforming sign.

S.W.2d 828, 829 (Tenn. 1978); *Tennessee Enamel Mfg. Co. v. Hake*, 183 Tenn. 615, 194 S.W.2d 468 (1946). It has long been settled that where an administrative procedure is provided by statute, a party claiming to have been injured must comply with that procedure before resorting to court. *State v. Yoakum*, 201 Tenn. 180, 193, 297 S.W.2d 635 (1956); *State ex rel. Jones v. City of Nashville*, 198 Tenn. 280, 279 S.W.2d 267, 283 (Tenn. 1955). However, exhaustion is not statutorily required unless the statute "by its plain words" requires it.[5] *Thomas*, 940 S.W.2d at 566; *Reeves v. Olsen*, 691 S.W.2d 527, 530 (Tenn. 1985).

In the situation where the legislature has provided more than one method to obtain judicial review, one of which involves administrative action or levels of appeal, exhaustion of administrative remedies is not statutorily required. *Reeves*, 691 S.W.2d at 530 (holding that because the statute expressly authorized alternative avenues of relief, exhaustion of administrative remedies under one of those avenues was not required for judicial review). In other words, where administrative remedies are not exclusive, but merely cumulative to or concurrent with a judicial remedy, exhaustion is not required by virtue of statute.

When not mandated by statute, the question of whether to require a party to exhaust available administrative remedies is a matter of judicial discretion. *Thomas*, 904 S.W.2d at 566 n.5; *Reeves*, 691 S.W.2d at 530. An important consideration in the exercise of that discretion is whether judicial review at the point requested would prematurely interrupt the administrative process. *Reeves*, 691 S.W.2d at 530. Additionally, the purposes behind the doctrine of exhaustion of administrative remedies should be considered:

> The exhaustion doctrine serves to prevent premature interference with agency processes, so that the agency may (1) function efficiently and have an opportunity to correct its own errors; (2) afford the parties and the courts the benefit of its experience and expertise without the threat of litigious interruption; and (3) compile a record which is adequate for judicial review. In addition, an agency has an interest in discouraging frequent and deliberate flouting of the administrative process.

Thomas, 940 S.W.2d at 566.

There are exceptions to the exhaustion requirement. Several are similar or related, although often stated separately. One exception applies where the party challenges the validity of an

[5]In *Thomas*, for example, the Court considered the statutory scheme for disputing property tax assessments and found that although the statutes allowed the board of equalization authority to create an assessment appeals commission and to designate administrative judges to make preliminary recommendations, nothing in the statute required the taxpayer to avail himself or herself of those steps. "Rather, the statute providing for appeal to the assessment appeals commission is worded permissively." *Thomas*, 940 S.W.2d at 566. Additionally, the Court found that appeal from the assessment appeals commission to the board was clearly discretionary since the statute provided for judicial review of the final action by the commission. *Id.*

ordinance or statute that would be applied by the administrative decision maker.[6] *Poteat v. Bowman*, 491 S.W.2d 77, 80 (Tenn. 1973). Another applies where the party seeking judicial review raises only questions of law rather than questions of fact. *Bracey*, 571 S.W.2d at 830; *Fentress County Bank v. Holt*, 535 S.W.2d 854, 857 (Tenn. 1976). A third exception applies where pursuit of administrative relief would be futile or useless. *Yoakum*, 201 Tenn. at 195, 297 S.W.2d 635, 642 (1956). Stated another way, a party is not required to seek administrative review or relief if the administrative process would have afforded no review "over key issues" and would have afforded no possible remedy. *Cherokee Country Club, Inc. v. City of Knoxville*, __ S.W.3d ___, 2004 WL 2657148, at *12 (Tenn. Nov. 22, 2004).

Related to the issue of exhaustion of administrative remedies is the question of which procedural method is appropriate to seek judicial review of local land use decisions. The different methods for judicial review emanate from the different powers given to local governments by the Tennessee General Assembly. First, the state legislature has delegated to local governments, with some limitations, the authority to regulate use of private property through zoning ordinances. *Lafferty v. City of Winchester*, 46 S.W.3d 752, 757-58 (Tenn. Ct. App. 2001); *see also Draper v. Haynes*, 567 S.W.2d 462, 465 (Tenn. 1978). The powers to enact and amend zoning regulations governing the use of land that are delegated to local legislative bodies are broad. *Fallin v. Knox County Bd. of Com'rs*, 656 S.W.2d 338, 342 (Tenn. 1983). When courts are asked to review the validity of a zoning ordinance, that review is restricted and involves only a determination of whether there is a rational or justifiable basis for the ordinance and whether it violates any state statute or positive Constitutional guarantee. *Id.* at 342-43.

The General Assembly has also delegated to local officials the authority to enforce zoning ordinances. Decisions by local zoning boards and officials involve the exercise of the local government's police power to protect the health, safety, and welfare of their citizens. *Draper,* 567 S.W.2d at 465; *Hoover, Inc. v. Metropolitan Bd. of Zoning Appeals*, 955 S.W.2d 52, 54 (Tenn. Ct. App. 1997). "In recognition of the policy that favors permitting the community decision-makers closest to the events to make the decision, the courts will refrain from substituting their judgments for the broad discretionary power of the local governmental body." *Lafferty*, 46 S.W.3d at 758, citing *McCallen*, 786 S.W.2d at 641-42.

When decisions applying zoning ordinances are made by local zoning administrators and boards, judicial review is under the common law of writ of certiorari, which provides a very limited scope of review by the courts. Under the common law of writ of certiorari, courts review a lower tribunal's decision only to determine whether that decision maker exceeded its jurisdiction, followed

[6]Additionally, where a party brings a facial challenge to the constitutional validity of a statute or ordinance, there is no requirement that the party first seek a ruling on that issue from the administrative body charged with applying or enforcing the legislation. *Richardson v. Tennessee Bd. of Dentistry*, 913 S.W.2d 446, 456 (Tenn. 1995). That is because administrative officials and bodies do not have the authority to declare a statute or ordinance unconstitutional. *Id*. at 452. "The facial constitutionality of a statute may not be determined by an administrative tribunal in an administrative proceeding." *Id*. at 454. *See also City of Memphis v. Shelby County Election Commission*, 146 S.W.3d 531, 537 (Tenn. 2004).

an unlawful procedure, acted illegally, arbitrarily, or fraudulently, or acted without material evidence to support its decision. *Lafferty*, 46 S.W.3d at 758, 759; *Fallin*, 656 S.W.2d at 342-43; *Hoover*, 955 S.W.2d at 54; *Hemontolor v. Wilson Co. Bd. of Zoning Appeals*, 883 S.W.2d 613, 616 (Tenn. Ct. App. 1994). Courts may not (1) inquire into the intrinsic correctness of the lower tribunal's decision, *Arnold v. Tennessee Bd. of Paroles*, 956 S.W.2d 478, 480 (Tenn. 1997); *Powell v. Parole Eligibility Rev. Bd.*, 879 S.W.2d 871, 873 (Tenn. Ct. App. 1994), (2) reweigh the evidence, *Watts v. Civil Serv. Bd. for Colum.*, 606 S.W.2d 274, 277 (Tenn. 1980); *Hoover, Inc. v. Metro Bd. of Zoning App.*, 924 S.W.2d 900, 904 (Tenn. Ct. App. 1996), or (3) substitute their judgment for that of the lower tribunal. *421 Corp. v. Metropolitan Gov't of Nashville*, 36 S.W.3d 469, 474 (Tenn. Ct. App. 2000).

The distinction between the two avenues for access to the courts to review local land use decisions has been explained by the Tennessee Supreme Court in *Fallin*, wherein the Court established the rules to be applied:

> It is our opinion that an action for declaratory judgment, as provided by T.C.A. §§ 29-14-101 – 29-14-113, rather than a petition for certiorari is the proper remedy to be employed by one who seeks to invalidate an ordinance, resolution or other legislative action of county, city or other municipal legislative authority enacting or amending zoning legislation.
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> * * *
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> We wish to point out, however, that the remedy of certiorari provided by T.C.A. §§ 27-8-101, 27-9-101 --27-9-113 will continue to be the proper remedy for one who seeks to overturn the determination by Board of Zoning Appeals as provided by T.C.A. § 13-7-106 *et seq*. and T.C.A. § 13-7-205 *et seq*. This distinction in remedies is made because the determinations made by the Board of Zoning Appeals are administrative determinations, judicial or quasi-judicial in nature, and are accompanied by a record of the evidence produced and the proceedings had in a particular case, whereas, the enactment of ordinances or resolutions, creating or amending zoning regulations, is a legislative, rather than an administrative, action and is not ordinarily accompanied by a record of the evidence, as is the case of an administrative hearing.

Fallin, 656 S.W.2d at 342-43.

Thus, where the action being challenged is administrative or quasi-judicial in nature, rather than legislative in nature, the appropriate method for reviewing that action is by common law writ of certiorari. *McCallen v. City of Memphis*, 786 S.W.2d 633, 640 (Tenn. 1990). The connection between the requirement of exhaustion of administrative remedies and review by common law writ of certiorari is obvious. A party cannot bypass administrative decision makers and then seek to avoid the standard of review applicable to common law writ of certiorari because there is no record of proceedings below and no administrative or quasi judicial decision made. The absence of an

evidentiary record does not mean that a party challenging government action can evade the strictures of certiorari review by simply failing to initiate administrative action which might produce such a record. In the case before us, it was B.F.'s failure to initiate administrative action or review that resulted in the absence of an evidentiary record and findings of an administrative board, not the City's.

Where, however, the challenge is to the legal validity of the ordinance, a direct action for declaratory judgment may be brought. *See* Tenn. Code Ann. § 29-14-103 (providing that any person whose rights, status or other legal relations are affected by a statute or municipal ordinance "may have determined any question of construction or validity arising under" the statute or ordinance and "obtain a declaration of rights, status or other legal relations thereunder.")

The City argues that B.F. was required to pursue its administrative remedies by appealing the determinations of the sign administrator (that any reconstructed sign would have to comply with the current ordinance and that the old sign had been abandoned and was therefore subject to removal under the ordinance) to the Board of Zoning Appeals, relying on Tenn. Code Ann. § 13-7-207(1), which gives such boards the power to:

> Hear and decide appeals where it is alleged that there is error in any order, permit, decision, or refusal made by the municipal building commissioner or any other administrative official in the carrying out or enforcement of any provision of any ordinance enacted pursuant to this part and part 3 of this chapter;

The City argues that, if the non-conforming use statute applies, there would be inherently factual determinations to be made; those determinations should be made by the Board of Zoning Appeals; and review of the Board's determinations would be under the common law writ of certiorari.

The question of whether appeal of an administrator's decision to the board of zoning appeals is a pre-requisite for court review has been discussed in a number of cases. In *Poteat, supra*, the building commissioner denied a building permit, and the unsuccessful applicant sued seeking a writ of mandamus to compel issuance. The applicant argued that appeal to the board would be useless and unavailing since the denial of the permit was based on purely legal grounds. The Tennessee Supreme Court affirmed the trial court's dismissal for failure to exhaust administrative remedies, stating:

> The Board is not limited by any findings or opinions of the Building Commissioner. The Court is of the further opinion that there is a distinction between the case where the petitioner has been denied a permit because of an ordinance that petitioner insists is invalid because it infringes upon some constitutional right or because the ordinance was not properly adopted and therefore does not legally exist. In such cases it has been held that the writ of mandamus is proper to decide the constitutional question without the exhaustion of the administrative remedy provided, it being stated that the

> administrative agency did not have the authority to pass on the constitutional question. In this case the petitioner is relying upon the validity of the ordinance or resolution and wishes to receive benefits under the very ordinance or resolution which provides administrative machinery which he states would be useless and unavailing. The appeal being De novo, the Board of Appeals may substitute its judgment for that of the Building Commissioner. The Board may disagree entirely with him. The Board may see no impediments whatsoever and may grant the permit if they think it proper. Under such circumstances, it cannot be said that the remedy to review the action of the Building Commissioner was inadequate. To so hold, it would be necessary to assume, without any basis therefor, that the Board of Zoning Appeals would not do its duty. The presumption is to the contrary. It follows therefore, that the motion to dismiss the Complaint for a writ of mandamus should be sustained on the ground that the petitioner has not exhausted his administrative remedies.

Poteat, 491 S.W.2d at 80.

This court has also considered whether a party should have appealed to the board of zoning appeals in a number of cases. Implicit in those opinions is a determination that exhaustion is not statutorily required in this situation, leaving the decision of whether to require it to the discretion of the court. We have reached different conclusions, depending on the facts of each case and the issues raised.

In *Robison v. The Metropolitan Government of Nashville and Davidson County*, No. 01-A-019105-CH-00178, 1992 WL 205268 (Tenn. Ct. App. Aug. 26, 1992) (No Tenn. R. App. P. 11 application filed), the landowners did not apply for any permit and were not denied one. Instead, they asked the codes administrator for his interpretation of state laws and local ordinances affecting the landowners' intentions regarding their property. The administrator gave them his interpretation, which they did not like, and the landowners then brought a declaratory judgment action requesting the court to determine their rights under the relevant statutes, specifically Tenn. Code Ann. § 13-7-208, the grandfather statute at issue herein, and ordinances.

This court affirmed the trial court's dismissal of the complaint because the landowners had failed to exhaust their administrative remedies by appealing the administrator's interpretation to the board of zoning appeals. *Id*. at *4. We found that both state law and local ordinance gave the board the authority to review the administrator's interpretation and gave the landowners' the right to appeal to the board. Acknowledging that declaratory judgment actions may be used to test the validity of a zoning ordinance, this court concluded that they are not appropriate to review local officials' interpretations of zoning ordinances. The court stated, "These decisions are best left to local officials, and therefore, the courts are reluctant to second-guess local decisions unless they are arbitrary, illegal, or capricious," obviously referring to the standard of review in certiorari cases. *Id*. at *4, citing *McCallen*, 786 S.W.2d at 641-42. We found that appeals to the board furthered the policy of placing land use decisions in the hands of local officials and that such an appeal would

have been effective and efficient in that case, indicating that we agreed with the trial court's exercise of its discretion to require exhaustion of administrative remedies.

In *Sanders v. Angie Properties, Inc.*, 834 S.W.2d 332 (Tenn. Ct. App. 1992), a property owner refused to seek a conditional use permit because he believed that he was operating a valid nonconforming use. The county's zoning compliance officer had sent the property owner a notice that he was violating the zoning ordinance by operating a junkyard and having an additional building on the site without site plan approval. This notice advised the owner to get an approved zoning certificate within thirty (30) days or remove all unlicensed inoperative vehicles and the unpermitted structure. The property owner responded that he was not operating a junkyard and that his use of the property was a legal use which predated the zoning change. The zoning official filed an action in court asking for a permanent injunction ordering the defendant to cease and desist the illegal use of his property. The property owner defended his use of the property by arguing his prior use was grandfathered in. The trial court held that because the property owner has not gone through the board of zoning appeals, he had failed to exhaust his administrative remedies and the court lacked jurisdiction to determine whether a violation of the ordinance in fact existed.

In *Sanders*, the county did not argue that its zoning ordinance required or provided for an administrative determination of whether the owner had a valid nonconforming use or that the ordinance required a property owner to seek a permit even if the use was valid. This court concluded that the owner was entitled, without first going to the board of zoning appeals, to have the trial court determine whether his use of the land was a junkyard or a prior nonconforming use. *Sanders*, 834 S.W.2d at 334.

In *Thompson v. Metropolitan Government of Nashville and Davidson County*, 20 S.W.3d 654 (Tenn. Ct. App. 1999), the landowner sought judicial review of the denial by the zoning administrator of building permits, which denial was based on a changed interpretation of state law on subdivision of land. The landowner initially appealed to the board of zoning appeals, but apparently no hearing before that body took place. The landowner brought an action that included a petition for writ of certiorari, one for mandamus, and a request for declaratory judgment. He argued that the denial of the permits was arbitrary and capricious since he had proceeded to develop his property based on advice or interpretation given him by the codes administrator before the city changed its interpretation. He also alleged the application of the new interpretation in this situation violated his constitutional rights to equal protection and due process.

This court began its analysis by determining what type of action the landowner had brought in the trial court. Stating that it was well-settled that the administrative decision whether to grant a building permit was properly reviewable under the common law writ of certiorari, and noting that the action had come to court unaccompanied by an administrative record because the landowner had abandoned his appeal to the board of zoning appeals, we held that because the land owner had failed to exhaust his administrative remedies, he could not bring a common law writ of certiorari action. 20 S.W.3d at 659. As a result, the landowner could not challenge the administrator's decision as arbitrary and capricious, and the court could not review the decision on those grounds. *Id*. at 660.

We held, however, that while a declaratory judgment action was not the proper means for reviewing a zoning administrator's decision for arbitrariness or capriciousness, it could, however, be used to determine the constitutionality of any law. *Id*. at 660. In addition, a court could issue a declaratory judgment on the question of whether the division and sale of certain property constituted a subdivision under state statute, in other words, whether the subdivision statute was applicable. *Id.*

In *Coe v. City of Sevierville*, 21 S.W.3d 237 (Tenn. Ct. App. 2000), the landowner did not file an application for a permit to demolish and rebuild an advertising sign after being advised by the city's building official that her sign would not qualify for a renovation permit under existing ordinances. Instead, she filed a complaint seeking a declaratory judgment that she was entitled to demolish and rebuild her sign because it was a non-conforming use protected by the grandfather statute, Tenn. Code Ann. § 13-7-208, as well as a writ of mandamus ordering issuance of the permit.

The city argued that since the landowner had not applied for a permit and none had been denied, her complaint should be dismissed for failure to exhaust her administrative remedies. At the suggestion of the trial court, the landowner applied for the permit. The city informed her that it was going to hold the application in abeyance and not act on it until after the pending litigation was determined.

Applying the holding of *Thomas* and the factors and purposes enunciated therein, this court determined that the plaintiff did not "flout" the administrative process, tried to comply with that process by filing, albeit late, an application for a permit, and it was the city administrators who refused to act on the application. 21 S.W.3d at 242. We also found that the administrator's failure to take action on the permit application was not "an official action" denying the application and, consequently, there was no appealable decision from the administrator that the board of zoning appeals could have reviewed. 21 S.W.3d at 241. Consequently, this court concluded that the landowner's attempt to exhaust her administrative remedies was sufficient to avoid dismissal on that ground.

From all these and other authorities, we conclude that the Tennessee Supreme Court has consistently provided the guidelines to be applied to the questions raised in the case before us, both in cases where the issue was framed as exhaustion of administrative remedies and those where it was framed as the appropriate procedure to use for review of local land use decisions. The Court has most recently repeated the test in *Cherokee Country Club, Inc. v. City of Knoxville*, wherein the Court held that the issuance of a writ of mandamus was proper even though the landowner had not appealed the denial of a demolition permit to the local board of zoning appeals because the landowner challenged the validity of an ordinance, not the official's discretion in denying the permit. 2004 WL 2657148, at *12.

Thus, to the extent B.F. seeks to challenge an administrative determination that the sign it now proposes to erect is prohibited, or an administrative determination denying permission to build such a sign, the proper avenue for judicial review is common law writ of certiorari. Consequently, as to those issues involving application of the ordinance or statute to a particular situation or a local

official's exercise of discretion in applying them, B.F. is required to appeal the determinations of the sign administrator to the board of zoning appeals and obtain a decision based upon an evidentiary record that the court can review in a common law writ of certiorari action.

However, to the extent that B.F. seeks a declaratory judgment regarding the validity of Franklin's sign ordinance, in view of the state statute grandfathering noncomforming uses, that issue was subject to determination by the court in a direct action for declaratory judgment, without the requirement of the exhaustion of administrative remedies. B.F. argues the ordinance cannot be applied to its sign because of the statute. Thus, its challenge can be viewed as one of validity or applicability.

We construe B.F's complaint to implicate components of both kinds of requests. Nonetheless, the questions of the validity of the ordinance and whether it can be applied in this situation predominate because the answers to those questions determine the course of any future administrative action that may be required.

V. DO THE PROTECTIONS OF THE STATUTE APPLY TO AN ON-SITE SIGN?

In the case before us, B.F. essentially claims that Franklin's ordinance that requires that replacement or rebuilt non-conforming signs must comply with the current requirements of the sign ordinance violates or contradicts Tenn. Code Ann. § 13-7-208. This statute is a grandfather statute which is "an exception to a restriction that allows all those already doing something to continue doing it, even if they would be stopped by the new restriction." *Coe*, 21 S.W.3d at 243 (quoting BLACK'S LAW DICTIONARY, 629 (5th Ed. 1979)). The goal behind the enactment of Tenn. Code Ann. § 13-7-208 was "to protect established businesses from later-enacted municipal zoning which would exclude them." *Outdoor West of Tenn. v. Johnson City,* 39 S.W.3d 131, 137 (Tenn. Ct. App. 2000).

A party seeking the protection of the grandfather statute has the burden of proving that its use is a preexisting nonconforming use which qualifies for the protection of the statute. *Coe,* 21 S.W.3d at 243; *Lamar Adver. of Tenn., Inc. v. City of Knoxville*, 905 S.W.2d 175, 176 (Tenn. Ct. App. 1995). Generally, in order to qualify for the exception in Tenn. Code Ann. § 13-7-208, parties must make two threshold showings: (1) that there has been a change in zoning and (2) the use to which they put their land was permitted prior to the zoning change. *Lamar*, 905 S.W.2d at 176; *Rives v. City of Clarksville*, 618 S.W.2d 502, 505 (Tenn. Ct. App. 1981).

In the case before us, the City argues that the protections of Tenn. Code Ann. § 13-7-208 do not apply because (1) there has been no change in permitted uses on the property B.F. occupies with its restaurant, (2) the sign in question was neither a non-conforming nor principal use, and (3) an on-

site advertising sign is not a "business establishment" in and of itself.[7] According to the City, the sign is an accessory structure and the statute protects non-conforming uses, not non-conforming structures. We agree that both the wording of the statute and subsequent court interpretations require a change in zoning that would make the use no longer conform to current zoning ordinances. We also agree that there has been no change in the allowed principal uses of the property through enactment or amendment of a zoning ordinance.[8]

We think, however, that the question we must decide is whether enactment of a sign ordinance should be considered a change in zoning so as to trigger the protections of Tenn. Code Ann. § 13-7-208. By the terms of the statute, the protections of Tenn. Code Ann. § 13-7-208 apply where new "zoning restrictions" are enacted where none previously existed or to "zoning restrictions" that differ from those in effect before a change. Tenn. Code Ann. § 13-7-208(b). Subsections (c) and (d) refer to prior operation under "zoning regulations."

These statements of the applicability of the grandfather protections require that we determine whether limitations on the size and location of on-site advertising signs are zoning restrictions.[9] *See Cherokee Country Club, Inc.*,__ S.W.3d ___, 2004 WL 2657148, at * 3 (stating that the question was whether a particular ordinance was a zoning ordinance or a building regulation). The non-conforming use or grandfather statute is part of the set of statutes delegating zoning authority to local governments. Consequently, the terms "zoning restrictions" and "zoning regulations" must be interpreted in light of the entire statutory scheme.

Municipalities, "for the purpose of promoting the public health, safety, morals, convenience, order, prosperity and general welfare," are given authority to adopt ordinances regulating the

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[7]Advertising signs not on the premises of a commercial or business establishment are treated differently. The most common example are billboards located some distance from the business that is advertised thereon. In that situation, the erection and maintenance of the billboard is the business carried on the property where it is sited. *Outdoor West of Tennessee, Inc. v. City of Johnson City*, 39 S.W.3d 131, 137-38 (Tenn. Ct. App. 2001) (holding that the billboards in that case were business establishments of the billboard company and that each billboard was one of the sign company's places of business).

[8]A restaurant operated at this location before adoption of the Franklin sign ordinance and continues to operate there. No question has been raised regarding the continued use of the property for a restaurant.

[9]One alternative is that they be considered more akin to building codes and safety requirements. *See Hunter v. Metropolitan Board of Zoning Appeals*, No. M2002-00752-COA-R3-CV, 2004 WL 315060, at *4-5 (Tenn. Ct. App. Feb. 17, 2004) (no Tenn. R. App. P. 11 application filed) (considering landowners' argument that they were allowed under Tenn. Code Ann. §13-7-208 to demolish their business's existing building and construct a new one without complying with a landscape buffer requirement applicable to all new construction adjacent to residentially zoned property, stating that the landowners' argument that Tenn. Code Ann. § 13-7-208 protected them from imposition of the landscape buffer ordinance "overlooks the marked difference between the legal principles regarding a landowner's use of property and the legal principles governing a landowner's obligation to see to it that the structures on its property meet all applicable building, safety, and zoning requirements," and holding that the statutes and ordinances governing nonconforming uses had no application to the case and that the only issue was whether the landowners' new building and met the applicable building requirements).

"location, height, bulk, and number of stories and size of buildings and **other structures**" as well as the "**uses of** buildings, **structures**, and land for trade, industry, residence, recreation, public activities and other purposes." Tenn. Code Ann. § 13-7-201(a)(1) (emphasis added). Thus, zoning authority includes the power to regulate the size of structures other than buildings and the use of structures as well as the use of land.[10] Such regulations would be zoning restrictions. Consequently, ordinances regulating the location, size and number of advertising signs on property used for commercial purposes, even if they are considered merely accessory structures, are zoning restrictions.

The Tennessee Supreme Court recently dealt with the question of whether a particular ordinance was a zoning ordinance for purposes of the requirements for valid adoption of such ordinances. *Cherokee Country Club, Inc.*,__ S.W.3d ___, 2004 WL 2657148, at *3-6. To answer that question, the Court reviewed approaches used in other jurisdictions and adopted an analysis of whether the regulation or ordinance at issue "substantially affects" the property owner's use of his or her land. *Id*. at *6. The court preferred this approach, among other reasons, because it was "more comprehensive and more precise than simply attempting to distinguish whether the terms of an ordinance regulate the use of land or how the land is used." *Id.* Applying that analysis to the issue at hand, we conclude that an ordinance regulating the number, location, and size of advertising signs on property used for commercial purposes does substantially affect the property owner's use of the property. Specifically, B.F.'s ability to reconstruct a sign advertising its restaurant to motorists on the interstate substantially affects its ability to use its commercial property.

Accordingly, under both the language of the statutes and the analysis of *Cherokee Country Club*, we hold that the Franklin sign ordinance is a zoning restriction or zoning regulation as those terms are used in the grandfather provisions of Tenn. Code Ann. § 13-7-208. Therefore, the protections in subsections (b), (c), and (d) of that statute apply to on-site advertising signs.

Our conclusion is consistent with a prior opinion involving essentially the same questions. As the trial court noted and as the parties have briefed, this court has previously considered the application of Tenn. Code Ann. § 13-7-208 to a situation involving the reconstruction of advertising signs that did not meet current sign ordinances, but were in compliance with all ordinances when built, on the site of a business establishment. *Nat'l Autos/Truck Stops, Inc. v. Williamson Co., Tenn.*, No. M2000-02456-COA-R3-CV, 2001 WL 434860 (Tenn. Ct. App. Apr. 30, 2001) (perm. app. denied Sept. 24, 2001). In that case, a business operated a truck stop that included on its property some signs advertising the truck stop. The county adopted a sign ordinance that rendered the signs on the property legally nonconforming with the new ordinance. The county later adopted amortization provisions that sought to compel owners to remove the nonconforming signs. The truck stop was informed by the county codes office that all nonconforming signs on its property must be removed.

[10]The City does not argue that the sign portion of its zoning ordinance was not enacted pursuant to its zoning authority.

The business argued that it was entitled to continue use of the signs and to replace them if necessary or commercially expedient because they were grandfathered in under Tenn. Code Ann. § 13-7-208. Its application to replace the signs was denied, thereby triggering the litigation. The trial court agreed with the county's argument that the grandfathering statute afforded no protection to signs, but only to businesses. This court reversed.

This court determined that both of the required elements established in *Rives* were met. "First, there has been a change in the zoning restrictions (making the signs illegal); second, the use of the signs was permitted before the zoning change." 2001 WL 434860, at *4. The county made the same argument in that case as is made here, *i.e.*, that the signs were not subject to the protection of Tenn. Code Ann. § 13-7-208. This Court disagreed, finding that the signs were an integral part of the business establishment "much the same as the building in which the service station is housed" and that the statute nowhere indicated that accessory uses are not protected. *Id*. at *3. The Court held that Tenn. Code Ann. § 13-7-208 protected not only principal uses, but the accessory uses of the business establishment as well, stating "within the purview of the statute, one cannot be separated from the other." *Id.*

Additionally, our conclusion is consistent with legislative intent found in a recent amendment to the grandfather statute. In 2004, the Tennessee General Assembly amended Tenn. Code Ann. § 13-7-208 by adding a section removing the protections of the statute in situations where there is a cessation of operation for a period of thirty (30) continuous months. 2004 Tenn. Pub. Acts, ch. 775 (effective May 28, 2004). For purposes of the current discussion, the significance of the amendment is the legislature's inclusion of "any existing or proposed on-site sign."[11] Thus, the legislature has clarified that, whether considered accessory uses or accessory structures, on-site advertising signs are to be included in the coverage and/or protections of Tenn. Code Ann. § 13-7-208.

VI. CAN B.F. AVOID THE ORDINANCE ON THE BASIS OF THE STATUTE?

Just because Tenn Code Ann. § 13-7-208's provisions grandfathering nonconforming uses apply to on-site advertising signs, it does not necessarily follow that B.F. is entitled to a declaratory judgment that it has "a statutory right to reconstruct the subject sign regardless of the provisions of the Franklin Zoning Ordinance." To be entitled to the relief it sought, B.F. would have to show two things: that it was entitled to the protection of the statute and that the ordinance contravenes the statute. We begin with the second.

The power of local governments to enact ordinances regulating the use of private property is derived from the State and is delegated to them by the legislature. *421 Corporation*, 36 S.W.3d at 475. While local governments have broad discretion in enacting such regulation within the power delegated to them, such ordinances cannot contravene or conflict with applicable state laws. *Id.*

[11]New subsection (g) of Tenn. Code Ann. § 13-7-208 includes the statement that, "Any time after the thirty (30) month cessation, any use proposed to be established on the site, including any existing or proposed on-site sign, must conform to the provisions of the existing zoning regulations."

(stating that local governments cannot enact ordinances that "ignore applicable state laws, that grant rights that state law denies, or that deny rights that state law grants"); *see also Fallin*, 656 S.W.2d at 342 (holding that the scope of judicial review of the validity of a zoning ordinance includes determination of whether the ordinance violates any state statute); *Family Golf of Nashville, Inc. v. Metropolitan Government*, 964 S.W.2d 254, 257 (Tenn. Ct. App. 1997) (holding that although the zoning power is broad, it cannot be exercised in a manner that conflicts with state law).

When there appears to be a conflict between a statute and a zoning ordinance, courts should read them *in pari materia* to avoid conflict and to enable them, whenever possible, to operate concurrently. *421 Corporation*, 36 S.W.3d at 478. When a statute and an ordinance are in irreconcilable conflict, however, the ordinance must give way to the imperatives of the statute. *Manning v. City of Lebanon*, 124 S.W.3d 562, 565 (Tenn. Ct. App. 2003).

B.F. intends to replace a sign that was damaged by storms and largely demolished because of the dangers it posed at the time. Consequently, its reconstruction is covered by subsection (d)[12] of Tenn. Code Ann. § 13-7-208. B.F. asserts that this provision gives it a vested right to reconstruct the demolished sign notwithstanding any provisions of the Franklin ordinances. The particular ordinance provision that B.F. challenges prohibits the replacement or reconstruction of a nonconforming sign unless the replaced or reconstructed sign conforms to the provisions of the current ordinance.[13]

The City acknowledges that B.F. would not be allowed to reconstruct its sign in accordance with its current plans if the sign ordinance applies because of height restrictions and because of the limitation of one business sign per lot per street. The City defends this result by arguing that it has the authority to amortize non-conforming signs by limiting extensions or repairs, relying on *Rives v. City of Clarksville*, 618 S.W.2d at 507-510.

In *Rives*, this court examined whether a city had authority to enact ordinances that had the effect of amortizing non-conforming uses by requiring that such uses cease within a specified time after enactment of the zoning change making them non-conforming. We examined authorities from a number of jurisdictions to identify how various courts had dealt with the issue and held cities could require termination of non-conforming uses within a specified period of time provided that the amortization provision was reasonable in and of itself and that it was reasonable as applied to a particular property owner. *Id*. at 509.

However, the entire discussion in *Rives* of the validity of such amortization provisions was focused on their constitutionality. Because the court had found the grandfather statute, Tenn. Code

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[12]Subsection (c) allows business establishments in operation prior to a zoning change to expand operations and "construct additional facilities which involve an actual continuance and expansion of the activities of the industry or business which were permitted and being conducted prior to the change in zoning" subject to certain conditions.

[13]The City also points to Section 8.7.5(3) of the ordinance, which applies specifically to destroyed or dilapidated non-conforming signs and prohibits the reconstruction of such signs unless the reconstructed or repaired sign complies with the sign ordinance.

Ann. § 13-7-208, inapplicable to the property at issue because there had been no zoning changes directly affecting the landowner's use of his property after the effective date of the statute in 1973, the court did not address the validity of the ordinance in light of the statute. Consequently, the *Rives* court's discussion of amortization provisions is of limited relevance in the case before us because the ordinance is challenged here on the basis it conflicts with the grandfather statute.[14]

The State, through enactment of Tenn. Code Ann. § 13-7-208, has established the public policy of this state regarding non-conforming uses by recognizing the interests of property owners in continuing to use their property despite later local zoning change. Consequently, while a city has authority to regulate signs, that regulation cannot contravene Tenn. Code Ann. § 13-7-208. *Outdoor West*, 39 S.W.3d at 137.

While a complete prohibition on the reconstruction of the sign could arguably contravene Tenn. Code Ann. § 13-7-208(d), merely requiring that the reconstructed sign, or any other structure, comply with certain kinds of requirements, *e.g.*, building, safety, etc., would not necessarily conflict with the statute. *Hunter*, 2004 WL 315060 at *4-5 (holding that reconstructed building must comply with current landscape buffer requirements). The General Assembly has clarified this issue by a recent amendment to Tenn. Code Ann. § 13-7-208 that added a new subsection (i) that provides:

> Notwithstanding the provisions of subsection (d), any structure rebuilt on the site must conform to the provisions of the existing zoning regulations as to setbacks, height, bulk, or requirements as to the physical location of a structure upon the site, provided that this subsection shall not apply to off-site signs.

2004 Tenn. Pub. Acts, ch. 775.

This amendment became effective after B.F. brought this action and cannot be applied to resolve the issues in this appeal. Nonetheless, it makes clear that the legislature did not intend that Tenn. Code Ann. § 13-7-208(d) give landowners with non-conforming uses immunity from all local regulation of reconstructed structures.

Courts will not find that an ordinance conflicts with or contravenes a statute unless it is shown that the party seeking relief from the ordinance is entitled to invoke the statute. In other words, no conflict arises unless the statute actually applies to the situation at hand. A party claiming the protection of a grandfathering provision, including that set out in Tenn. Code Ann. § 13-7-208, has the burden of proving that it qualifies for that protection under the terms of the provision. Additionally, because a grandfather clause creates an exception to otherwise applicable law, it must

[14]We must point out that in *Riggs v. Burson*, 941 S.W.2d 44, 51 (Tenn. 1997), the Tennessee Supreme Court cited *Rives* for the proposition that "a land use law, if otherwise constitutional, may permissibly restrict or eliminate an existing use of land." *Riggs* involved a state statute, not an ordinance, and there was no issue regarding the grandfather statute.

be construed strictly against the party who seeks to come within the exception. *Teague v. Campbell Co.*, 920 S.W.2d 219, 221 (Tenn. Ct. App. 1995).

B.F.'s intention to replace a damaged and removed sign means any right it claims to reconstruct the sign must be found in Tenn. Code Ann. § 13-7-208(d). That subsection allows business establishments in operation prior to a change in zoning to destroy present facilities and reconstruct new facilities "necessary to the conduct of such industry or business subsequent to the zoning change," subject to certain conditions.[15] The statute further provides that no permit or similar permission for demolition, construction, or landscaping may be denied to a business seeking to destroy and reconstruct "facilities necessary to the continued conduct of the activities of that industry or business," where such conduct was permitted prior to a change in zoning, provided there is reasonable space and nuisance to neighbors is avoided.

Thus, even though the ordinance, if applied, would prohibit B.F. from reconstructing a sign or a sign of the height proposed, there is no direct conflict between the ordinance and B.F.'s rights under the grandfather statute unless the reconstructed sign is necessary to the continued conduct of the restaurant business on the property.[16] The City argues that the legislature's repeated invocation of necessity places a limiting condition on a party's right to rebuild or replace a non-conforming structure. We agree and have previously upheld such an interpretation of the statute. *Outdoor West of Tennessee, Inc.*, 39 S.W.3d at 136. B.F. has the burden of showing such necessity. *Id.* Because this case was dismissed on a motion to dismiss, there is no proof in the record regarding the business necessity for the sign.

In its complaint,[17] B.F. did not allege that reconstruction of the sign was necessary to the continued operation of its business. It simply alleged that pursuant to Tenn. Code Ann. § 13-7-208, it had a statutory right to reconstruct the sign. The complaint, however, also alleges that the sign was damaged on March 3, 1999, that on that day B.F. was ordered to remove it, and that B.F. removed the sign accordingly. The complaint makes clear that B.F. had not reconstructed the sign or contacted the City about its reconstruction when it received the letter of March 22, 2002. Thus, for more than three years before the complaint was filed herein, the restaurant had operated without the sign at issue.

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[15]Subsection (c) does not include the "necessary" requirement present in subsection (d) and, consequently, requires a lower standard of proof or, at least, proof of different facts. *See Outdoor West*, 39 S.W.3d at 136.

[16]In *Nat'l Auto/Truck Stops*, there was no dispute that replacement of the signs was necessary to the continued conduct of business at the truck stop's location and that the signs were an integral part of the business. 2001 WL 434860, at * 3.

[17]In reviewing the dismissal of B.F.'s complaint, we must construe the complaint liberally, presume all factual allegations to be true, and give B.F. the benefit of all reasonable inferences. *Trau-Med of America v. Allstate Insurance*, 71 S.W.3d 691, 696 (Tenn. 2002). Further, a complaint should not be dismissed for failure to state a claim unless it appears that the plaintiff can prove no set of facts in support of his or her claim that would warrant relief, and the complaint must just set forth a short and plain statement of the claim showing that the pleader is entitled to relief. *Id*.

The City argues that the lack of proof that the replacement sign is necessary to the continued conduct of the business is fatal to B.F.'s claim. Since the sign has not been in place for four years, and the restaurant has managed to remain in operation, the City argues that it is obvious that the sign should not be considered a necessary part of the business operation. The City also points out that a hearing before the Board of Zoning Appeals would have produced a record regarding this issue, as another reason why B.F. should be required to appeal to the Board.

While we agree that the failure of B.F. to do anything to replace the sign for over three years significantly lessens the likelihood that B.F. would be able to prove that the reconstructed sign was necessary to the continued operation of its restaurant, we are reluctant to hold that B.F. cannot prove any set of facts that would show it meets the necessity requirement of Tenn. Code Ann. § 13-7-208(d). B.F. should be given the opportunity to provide proof on the issue. However, we agree with the City that the proper forum for providing that proof is the Board of Zoning Appeals, not the courts. How the statute and ordinance apply to the situation at hand must be determined before, or in conjunction with, any legal issues. This is an administrative or quasi-judicial act that is assigned, in the first instance, to local zoning officials.

The City also argues that B.F. had abandoned use of the sign in question by failing to reconstruct it or seek a permit to reconstruct it. In fact, the March 22, 2002, letter from the Signs Administrator directing B.F. to remove the remaining pylons was based upon the abandonment provision. Under the Franklin ordinance, as set out earlier, a non-conforming sign is considered abandoned if it does not display an advertising message for a period of 90 days. If a non-conforming sign is abandoned, the right to maintain it is terminated, and the owner of the property must remove it.

The abandonment provision does not directly contradict any provision of the grandfather statute in effect at the relevant times. In fact, the requirement that a non-conforming sign actually be used to advertise the business is complementary to the statutory requirement that the reconstructed facility be necessary to the conduct of the business. This court has upheld or applied similar abandonment of non-conforming use ordinances in other cases. In *Boles v. City of Chattanooga,* 892 S.W.2d 416 (Tenn. Ct. App. 1994), we held that a zoning ordinance providing that if a non-conforming use is discontinued for 100 days every future use must conform to current zoning requirement must be interpreted to mean a voluntary discontinuance involving an act, or failure to act, indicative of abandonment. *Id*. at 422. While there was apparently no direct challenge to the ordinance itself as inconsistent with state statute, this court implicitly held that such an ordinance can be enforced in the right circumstances, including where the time limit set by the ordinance is reasonable. *Id*. at 423 n. 4.

Chadwell v. Knox County, 980 S.W.2d 378 (Tenn. Ct. App. 1998) involved a city ordinance providing that if a non-conforming use is discontinued for a period of 6 months, any future use must comply with current zoning. Although the question raised in *Chadwell* was whether the discontinuance of the property as a non-conforming use was voluntary, this court also stated that if the prior use qualified for protection under the grandfather statute, the landowners were entitled to

continue it as a non-conforming use "unless and until the site is discontinued as provided in the . . . Ordinance or as otherwise provided by law." *Id.* at 380. *In City of Chattanooga v. Robards*, No. E2003-01340-COA-R3-CV, 2004 WL 2412619 (Tenn. Ct. App. Oct. 28, 2004), we enforced a city ordinance that provided that a non-conforming use of a building that was discontinued for 100 consecutive days could not be restarted, but future use would have to comply with current zoning ordinances.

Finally, and most recently, in *Custom Land Development, Inc. v. Town of Coopertown*, No. M2003-02107-COA-R3-CV, 2004 WL 2973751 (Tenn. Ct. App. Dec. 22, 2004), the issue of the validity of an ordinance on abandonment of a non-conforming use in light of the grandfather statute was directly raised. This court agreed with the trial court's holding that "the placing of an objective time limit on non-conforming uses which are not operational is imminently reasonable and does not conflict with the state statutory scheme." *Id.* at *7. We also agree.

A recent amendment to the grandfather statute added an abandonment provision. Businesses operating as non-conforming uses who cease to operate for 30 consecutive months are not eligible to claim the protections of the grandfather provision. In particular, "anytime after the thirty (30) month cessation, any use proposed to be established on the site, including any existing or proposed on-site sign, must conform to the provisions of the existing zoning regulations." 2004 Tenn. Pub. Acts, ch. 775 (codified as Tenn. Code Ann. § 13-7-208 (g)).

Whether or not the ninety-day time limit in Franklin's ordinance on signs is reasonable is not an issue in this case because B.F. has not raised it and because, in fact, there was no sign in place for over three years.[18] This cessation of use of the sign exceeds even the new statutory time period. Also not before this court is the question of the whether Franklin's time period for signs contravenes the newly adopted amendment related to cessation of business.

A determination that B.F. has a right to reconstruct the sign it removed, when damaged, more than three years before filing the complaint herein, regardless of any provisions of the Franklin ordinance, would require a determination of factual issues related to the questions of necessity and voluntary abandonment, at the least. It would involve the application of the ordinances and statutes to the particular situation presented. For all the policy reasons set out in cases discussed earlier, such determinations are best left to the local officials charged with the responsibility to enforce and apply zoning ordinances.

Accordingly, while the trial court could have issued a declaratory judgment that, contrary to the City's arguments, the protections of Tenn. Code Ann. § 13-7-208(d) do apply to on-site advertising signs, B.F. was not entitled to a declaratory judgment that it could reconstruct its sign

[18]If the abandonment ordinance does not contravene the statute, it would be tested by a standard of reasonableness, as to the time limit imposed and other relevant factors. *Rives*, 618 S.W.2d at 510. The analysis includes both a facial reasonableness component as well as a determination of whether application of the ordinance to a particular situation is reasonable. *Id*.

without regard to the City's ordinances. B.F. should have appealed the Sign Codes Administrator's interpretation or determination to the Board of Zoning Appeals. Its failure to exhaust this administrative remedy justified the trial court's dismissal of the complaint.

CONCLUSION

We affirm the trial court's dismissal of B.F.'s complaint for declaratory judgment. Although the protections of Tenn. Code Ann. § 13-7-208(d) apply generally to on-site signs, B.F. was not entitled to a declaratory judgment that the statute gave it the right to reconstruct its sign without regard to ordinances limiting nonconforming signs. The costs on appeal are taxed to the appellant, B.F. Nashville, Inc.

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PATRICIA J. COTTRELL, JUDGE